

THE UNTAPPED POTENTIAL OF THE FAIR HOUSING ACT IN ADDRESSING AGGRESSIVE ENFORCEMENT OF “WALKING WHILE BLACK OR BROWN”

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What may arouse hostility is not the fact of aggressive patrol but its indiscriminate use so that it comes to be regarded not as crime control but as a new method of racial harassment.

KERNER COMMISSION REPORT (1968)¹

INTRODUCTION

Imagine being sent to the corner store by your mother to buy ketchup for a dinner of chicken and French fries. On your way back you see two plainclothes officers with badges in front of your building and three uniformed officers across the street. When you reach your building, the two plainclothes officers stop you and begin asking you questions, including where you are coming from, where you are headed, and what you have in your bag. After answering that you have ketchup in your bag, one of the officers asks you to raise your hands and then asks you what you have in your pockets. The officer starts to frisk you, first shaking your pockets, then putting a hand in your left pocket, then patting your arms down. Once he finishes, the officer asks you for your ID and takes your name down on a notepad. The other officer looks in your bag and inspects the ketchup. The officers ask you for your apartment number and ring the bell. They then ask your mother through the intercom to “please come down and identify your son.” Your mother runs down the stairs, thinking you are dead or hurt, and collapses on the steps when she sees you standing by the officers, uninjured. One of the officers approaches your mother, laughing, and hands her the ketchup. The officers then let you go.² After returning to your apartment, reality sets in: the police

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¹ REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 161 (1968) [hereinafter “KERNER COMMISSION REPORT”].

² Such was the experience of J.G., a black seventeen year old who was a named plaintiff in *Ligon v. City of New York*, a class action lawsuit challenging the New York Police Department’s (“NYPD’s”) stop-and-frisk policies and practices in and around thousands of private residential buildings around the City of New York enrolled in the Trespass Affidavit Program, also known as “Operation Clean Halls.” 925 F.Supp.2d 478, 483-85 (S.D.N.Y. 2013). J.G.’s experience of being suspected of trespassing for simply entering his apartment building is not an aberration. See NEW YORK LAWYERS FOR THE PUBLIC INTEREST, NO PLACE LIKE HOME: A PRELIMINARY REPORT ON POLICE INTERACTIONS WITH PUBLIC HOUSING RESIDENTS IN NEW YORK CITY 2 (Sept. 2008) (“Many residents report frequent police abuse of authority, particularly around the enforcement of trespass laws. For example in [certain public housing units operated by the New York City Public Housing Authority] approximately 30% of the residents surveyed reported they had been charged with trespassing, despite the fact that they lived there. Approximately 70% of those surveyed at the Thomas Jefferson Houses

stopped you for “walking while black (or brown).”³

This is the reality of “stop-and-frisk” policing. The story described above is not an isolated incident, nor is the racial identity of J.G. coincidental. Blacks and Latinos, particularly those in low-income neighborhoods, are subjected to this policing tool that, as Michelle Alexander writes, “would result in public outrage and scandal if committed in middle-class white neighborhoods.”⁴ But this reality is far from new. In 1968, the United States Supreme Court in *Terry v. Ohio* announced the constitutional standards for stop-and-frisk practices, and acknowledged “[t]he wholesale harassment [of racial minorities] by certain elements of the police community.”⁵ Citing the findings of the President’s Commission on Law Enforcement and Administration of Justice, the *Terry* Court wrote:

The President’s Commission on Law Enforcement and Administration of Justice found that “in many communities, field interrogations are a major source of friction between the police and minority groups.” It was reported that the friction caused by “misuse of field interrogations” increases “as more police departments adopt ‘aggressive patrol’ in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.” While the frequency with which “frisking” forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the “stop and frisk” of youths or minority group members is “motivated by the officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.”⁶

Supporters of the aggressive use of stop-and-frisk as a proactive policing tool perceive a much different reality. For them, stop-and-frisk is a valuable crime-fighting technique⁷ that

reported that they had been repeatedly stopped by police officers when simply coming and going around their homes.”); cf. Julie K. Brown, *In Miami Gardens, Store Video Catches Cops in the Act*, MIAMI HERALD (Nov. 22, 2013) (discussing how a twenty-eight year old black male received more than sixty citations for trespassing, most of which were issued at his place of employment), <http://www.miamiherald.com/2013/11/21/v-fullstory/3769823/in-miami-gardens-store-video-catches.html>.

³ See generally Clyde Haberman, *A Shooting, and Shooting from the Hip*, N.Y. TIMES, Feb. 12, 1999, at B1; Editorial, *Walking While Black in New York*, N.Y. TIMES, Mar. 23, 2013, at A16; George Yancy, Op-Ed., *Walking While Black in the “White Gaze,”* N.Y. TIMES (Sept. 1, 2013, 7:00 PM), <http://opinionator.blogs.nytimes.com/2013/09/01/walking-while-black-in-the-white-gaze/>; David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 & n.10 (1997); DAVID A. HARRIS, AMERICAN CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION’S HIGHWAYS (1999), available at <https://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways>.

⁴ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 96 (2010); see also *id.* at 120-24.

⁵ 392 U.S. 1, 14 (1968); see discussion *infra* Part II.a.

⁶ *Id.* at 14 n.11 (quoting PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183-84 (1967)).

⁷ See, e.g., OFFICE OF THE ATTORNEY GENERAL OF NEW YORK STATE, REPORT ON THE NEW YORK CITY

disproportionately affects racial minorities only because racial minorities are disproportionately represented among criminal offenders.⁸ Forty-five years after *Terry*, stop-and-frisk remains a major source of tension between the police and minority communities.

Despite efforts to reform local police departments, and despite the availability of federal legislative measures to challenge discriminatory stop-and-frisk practices in problematic departments, the abusive use of stop-and-frisk persists in the United States.⁹ In order to address seemingly unresolvable tensions, this Article argues that these practices should be challenged by

POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES [hereinafter "NY ATTORNEY GENERAL 1999 STOP & FRISK REPORT"] 45, 56 (1999) (describing the role of stop-and-frisk in furthering the New York City Police Department's goals of "order maintenance, deterrence, crime prevention, and a direct attack on gun violence"), available at http://www.ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf. But see Richard Rosenfeld & Robert Fornango, *The Impact of Police Stops on Precinct Robbery and Burglary Rates in New York City, 2003-2010*, 31 JUST. Q., 117-18 (2014) (finding few significant effects of stop, question, and frisk on robbery and burglary rates) ("We cannot conclude from the current investigation that SQF has no impact on crime in New York. But we can be more certain that, if there is an impact, it is so localized and dissipates so rapidly that it fails to register in annual precinct crime rates, much less the decade-long citywide crime reductions that public officials have attributed to the policy."); see also Jennifer Peltz, *Stop and Frisks Down in NYC; Bloomberg Cites Crime Drop But Critics Say It's Reverse*, HUFFINGTON POST (Aug. 28, 2013, 3:45 PM), http://www.huffingtonpost.com/2013/08/28/stop-and-frisks-nyc_n_3832082.html (citing lower crime rates in New York City in 2013, despite a decrease in street stops).

The effectiveness of a law enforcement tool, though, has no place in judging the constitutionality of police behavior. As the Supreme Court recently observed, "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table"—and the unconstitutional use of stop-and-frisk as policing tool is one of them. *District of Columbia v. Heller*, 554 U.S. 570, 676 (2008); see also Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Frisk Tactics*, N.Y. TIMES, Jan. 31, 2014, at A1 (recounting Police Commissioner William Bratton's statement, "We will not break the law to enforce the law," made during a press conference at which New York City's Mayor Bill de Blasio announced his intention to withdraw the appeal of the stop-and-frisk litigation).

⁸ See, e.g., DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 73-74 (2002) (compiling the opinions of police officers and a former Drug Enforcement Administration agent, among others). In a federal class action lawsuit challenging the New York City Police Department's stop-and-frisk practices, Judge Shira Scheindlin of the Southern District of New York rejected the testimony of the city's experts that the race of crime suspects was the appropriate benchmark for examining racial bias in stops. *Floyd v. City of New York*, 959 F.Supp.2d 540, 560 (S.D.N.Y. 2013). The district court recognized that the city and its highest officials believed that blacks and Hispanics should be stopped at the same rate as their proportion of the local criminal suspect population, but the court found the city's reasoning flawed because the stopped population was overwhelmingly innocent, not criminal. See *id.*

⁹ Although instances of police brutality—the torturing of black security guard Abner Louima in Brooklyn with a broomstick, the firing of forty-one bullets at African immigrant Amadou Diallo in the Bronx, and the videotaped beating of Rodney King in Los Angeles—garner the most media attention, they represent only a fraction of unlawful conduct in which some police officers engage. See Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 360 (2011); Michael Powell, *In a Volatile City, a Stern Line on Race and Politics*, N.Y. TIMES, July 22, 2007, at A1; *Patterns of Police Violence*, N.Y. TIMES, Apr. 18, 2001, at A22; see also NY ATTORNEY GENERAL 1999 STOP & FRISK REPORT, *supra* note 7, at 4 ("Many of the complaints [received by the Attorney General], if not most, revolved around lower-level police involvement in the everyday lives of minority residents, rather than celebrated cases of extreme abuse."). Police misconduct, however, includes a broader range of police practices that infringe on the civil rights of individuals where unconstitutional racial profiling is just one example. *Id.* at 360-61. An emerging consensus among police experts considers misconduct by individual officers the result of inadequate management policies and practices (the "rotten barrel" theory), as opposed to the result of bad individual officers (the "rotten apple" theory). Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State "Pattern or Practice" Statute*, 19 GEO. MASON. U. C.R. L.J. 479, 483-84 (2009).

relying on a statute already on the books, but one which traditionally has not been relied on in this context: the Fair Housing Act (“FHA”),¹⁰ which prohibits racial discrimination in the provision of municipal services in connection with the sale or rental of a dwelling.¹¹

This Article proceeds in several parts. Part II of this Article provides an overview of the legal terrain of stop-and-frisk. It summarizes the constitutional standards for stop-and-frisk, and discusses how this highly discretionary police practice has resulted in the racial profiling of pedestrians on a national scale. Part II also briefly describes the traditional mechanisms for addressing police misconduct and shares common criticisms of those measures. Part III explores the viability of relying on the FHA’s disparate impact theory to challenge the overly aggressive provision of police services in minority neighborhoods where intentional discrimination cannot be demonstrated. It does so first by reviewing the legal standard for a disparate impact claim and then by analyzing how courts have treated claims relating to the discriminatory provision of police services. Part III discusses how a plaintiff must proceed in using the FHA to challenge a police department’s stop-and-frisk practices under the disparate impact theory, and notes the advantages of doing so. Part IV concludes that an FHA disparate impact claim represents a promising means of sustainably remedying discriminatory police practices in minority neighborhoods.

I. RACIAL PROFILING IN PEDESTRIAN STOPS AND FRISKS

A. *The Constitutional Standards for the Practice of Stop-and-Frisk*

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment,¹² provides: “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated”¹³ The United States Supreme Court has affirmed time and time again that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”¹⁴ The Supreme Court has held that under the Fourth Amendment, police are constitutionally permitted to “stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause.”¹⁵ Such an investigative detention is now commonly referred to as a “*Terry* stop.”¹⁶

Whether a *Terry* stop has occurred depends on “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”¹⁷ The relevant inquiry

¹⁰ 42 U.S.C.A. § 3601 (2013).

¹¹ *Id.* § 3604(b).

¹² *Mapp v. Ohio*, 367 U.S. 643, 650 (1961).

¹³ U.S. CONST. amend. IV.

¹⁴ *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

¹⁵ *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1 (1968)).

¹⁶ *See, e.g., Floyd*, 959 F.Supp.2d at 565.

¹⁷ *Florida v. Bostick*, 501 U.S. 429, 436 (1991). *But see* Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1424 (2002) (arguing that “[t]he constitutional regulation of stops and searches is based in part on the premise that the average citizen feels free to ignore an armed police officer who asks for identification, or to look in the trunk, and that the nearly universal compliance with such demands is voluntary. . . [which] is a convenient fiction even under ordinary circumstances . . .”).

is “whether, taking into account all of the circumstances surrounding the encounter, the police conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.’”¹⁸ In order for a *Terry* stop to comply with the Fourth Amendment, the stop must be based on a reasonable suspicion that criminal activity “may be afoot.”¹⁹ The police officer must have a “reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity.”²⁰

The Supreme Court has recognized that a police officer making a *Terry* stop “should not be denied the opportunity to protect himself from attack by a hostile suspect.”²¹ For this reason, “a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted.”²² In order for a police officer to proceed from a stop to a frisk, the officer must have “reason to believe that he is dealing with an armed and dangerous individual.”²³ However, “[n]othing in *Terry* can be understood to allow a generalized ‘cursory search for weapons’ or indeed, any search whatever for anything but weapons.”²⁴

B. Racial Profiling: A National Problem

One scholar has commented that, through *Terry*, the Supreme Court gave its “legal blessing” to stop-and-frisk, thereby legitimizing a highly discretionary police practice.²⁵ This discretion includes where and whom to target.²⁶ Racial profiling²⁷ studies have confirmed that police exercise their discretion regarding whom to stop and search in a discriminatory fashion.²⁸ Provided below is a sample of the findings in these studies:

- In New Jersey, data revealed that less than 15 percent of all drivers on the New Jersey Turnpike were black, yet black motorists constituted more than 35 percent of those stopped and more than 73 percent of those arrested. This disparity did not result from blacks violating the traffic laws at higher rates. Instead, the data showed that blacks

¹⁸ *Bostick*, 501 U.S. at 437 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

¹⁹ *Terry*, 392 U.S. at 30.

²⁰ *United States v. Place*, 462 U.S. 696, 702 (1983) (citing *Terry*, 392 U.S. at 32-33).

²¹ *Adams v. Williams*, 407 U.S. 143, 146 (1972) (citing *Terry*, 392 U.S. at 24).

²² *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979) (citing *Adams*, 407 U.S. at 146).

²³ *Terry*, 392 U.S. at 27.

²⁴ *Ybarra*, 444 U.S. at 93-94.

²⁵ HARRIS, *supra* note 8 at 39; *see also* Alexander, *supra* note 4, at 121. Harris has also observed that following *Terry*, the Supreme Court addressed stop-and-frisk only on a handful of occasions, for the most part expanding the scope of police discretion. HARRIS, *supra* note 8 at 39.

²⁶ ALEXANDER, *supra* note 4, at 121.

²⁷ The term “racial profiling” can be defined as occurring “whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person’s racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating.” Gross & Livingston, *supra* note 17, at 1415. For somewhat different definitions of racial profiling, *see id.* at 1416 n.6.

²⁸ For an in-depth review of these studies, *see* HARRIS, *supra* note 8, at 53-69.

and whites violated traffic laws at the same rate.²⁹ A later study conducted by the Attorney General of New Jersey revealed that the overwhelming majority of searches conducted of motor vehicles (77.2 percent) were of those driven by blacks and Hispanics.³⁰

- In Maryland, blacks constituted 17 percent of the drivers along I-95, but 72 percent of those stopped and searched.³¹ And even though only 21 percent of all drivers were racial minorities (Latinos, Asians, and blacks), those groups constituted nearly 80 percent of those stopped and searched.³²
- In Volusia County, Florida, a local newspaper obtained 148 hours of video footage documenting almost 1,100 roadside stops conducted by deputies. Only five percent of the highway drivers were black or Latino, yet blacks and Latinos constituted more than 70 percent of those stopped and more than 80 percent of those whose cars were searched.³³
- In Illinois, state troopers assigned to a drug interdiction program called Operation Valkyrie singled out Latino motorists. Although Latinos comprised less than eight percent of the Illinois population and took fewer than three percent of the personal vehicle trips in the state, they accounted for about 30 percent of the motorists stopped by drug interdiction officers for discretionary offenses such as driving one to four miles over the speed limit. Latinos were less likely to have illegal contraband in their vehicles than whites.³⁴
- In Philadelphia, Pennsylvania, racial minorities constituted approximately 56 percent of the city's population, but almost 86 percent of those stopped on one particular week and more than 71 percent on another week.³⁵
- In Oakland, California, blacks were approximately twice as likely as whites to be stopped and three times as likely to be searched.³⁶

²⁹ *Id.* at 53-56; *see also* State v. Soto, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

³⁰ OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 27 (1999), *available at* www.state.nj.us/lps/intm_419.pdf.

³¹ HARRIS, *supra* note 8, at 61-62.

³² ALEXANDER, *supra* note 4, at 131.

³³ Jeff Brazil & Steve Berry, *Color of Driver Is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, at A1; David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 561-62 (1997).

³⁴ *See* HARRIS, *supra* note 3.

³⁵ *Id.*

³⁶ ALEXANDER, *supra* note 4, at 132.

- In Akron and Toledo, Ohio, blacks were more than two times as likely to be ticketed as all other drivers. In Franklin County and Dayton, blacks were 1.8 times as likely to be ticketed as other drivers.³⁷

The alarmingly consistent pattern of racial profiling illustrated by these studies is not limited to the traffic context. Racial profiling in pedestrian stops has also been the subject of study.³⁸ As David Harris writes, “What traffic stops are to profiling on the highways, stops and frisks are to profiling on the streets.”³⁹ A study commissioned by the Attorney General of New York, for example, found that black pedestrians were six times more likely to be stopped than whites in New York City.⁴⁰ Similarly, Latino pedestrians were four times more likely to be stopped than whites.⁴¹ However, stops of blacks and Latinos were less likely to result in arrests than those of whites.⁴² Although the NYPD claimed its stop-and-frisk program was critical to removing guns from the street, only 2.5 percent of the stops made on suspicion of weapons possession effectuated by the now-defunct Street Crime Unit—an elite unit of plainclothes officers tasked with recovering illegal firearms—resulted in an arrest for weapons possession.⁴³ Presumably, this is because most of the individuals stopped did not have any weapons.

Rather than respond to the troubling data by, for instance, questioning the effectiveness of its stop-and-frisk practices or engaging in a constructive dialogue with the community to assuage their serious concerns, the NYPD increased the number of pedestrian stops significantly, turning a blind eye to the disproportionate and ineffectual stop rates of racial minorities. Between January 2004 and June 2012, the NYPD conducted over 4.4 million *Terry* stops, with the number of stops per year rising sharply from 314,000 in 2004 to a high of 686,000 in 2011.⁴⁴ In 52 percent of the 4.4 million stops, the person stopped was black;⁴⁵ in 31 percent, the person was Latino.⁴⁶ The disproportionate stop rates were not attributable to blacks and Latinos engaging in illegal activity at higher rates than whites. In fact, the seizure rate for weapons and other illegal contraband was higher with white pedestrians (1.4% and 2.3%, respectively) than black (1% and 1.8%, respectively)

³⁷ HARRIS, *supra* note 8, at 68. The calculations were based on whether a black person was more likely to be ticketed than a white, Latino, or Asian person. Because other minorities, particularly Latinos, complained of being targeted for ticketing, the calculations understated the scope of the problem. *Id.*

³⁸ See generally HARRY G. LEVINE ET AL., TARGETING BLACKS FOR MARIJUANA: POSSESSION ARRESTS OF AFRICAN AMERICANS IN CALIFORNIA, 2004-2008 (2010); HARRY G. LEVINE & DEBORAH PETERSON SMALL, NEW YORK CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY, 1997-2007 (2008); Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STATISTICAL ASS'N 813 (2007).

³⁹ HARRIS, *supra* note 8, at 38.

⁴⁰ NY ATTORNEY GENERAL 1999 STOP & FRISK REPORT, *supra* note 7, at 95, 111 (1999).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 53, 53 n.32, 58, 117 n.23.

⁴⁴ *Floyd*, 959 F.Supp.2d at 558.

⁴⁵ *Id.*

⁴⁶ *Id.*

or Latino pedestrians (1.1% and 1.7%, respectively).⁴⁷ The significant number of total pedestrian stops does not reflect rampant illegal activity. Only 6 percent of all stops resulted in an arrest and another 6 percent resulted in a summons.⁴⁸ The remaining 88 percent resulted in no further enforcement action, suggesting that the NYPD stopped many innocent New Yorkers.⁴⁹

The ramifications of racial profiling, both in pedestrian stops and in general, are extensive. Patterns of police misconduct have a financial impact on municipalities and local police departments due to the costs of litigation and settlement.⁵⁰ For example, one group estimated that nationally, from January to December of 2010, more than \$346 million was spent on misconduct-related civil judgments and settlements.⁵¹ In New York City between 1994 and 2000, the municipality faced damages amounting to \$180 million in police misconduct cases.⁵² Similarly, during the 1990s, Detroit paid \$124 million in lawsuits related to police misconduct.⁵³ According to one scholar, the evidence suggests that any deterrent effect of damages remains weak and that police departments regard civil litigation and monetary damages as “not [their] problem” or simply part of the “cost of doing business.”⁵⁴

In addition to the financial repercussions of police misconduct, there is significant evidence that this misconduct “negatively impacts the perceived legitimacy of police officers and

⁴⁷ *Id.*

⁴⁸ *Id.* For a report analyzing the extent to which stop-and-frisk in New York City yields convictions, see OFFICE OF THE ATTORNEY GENERAL OF NEW YORK STATE, REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT’S STOP-AND-FRISK PRACTICES 1-2 (2013), available at http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf (finding, among other things, that close to half of all arrests that result from the stop-and-frisk program result in a criminal conviction or violation; less than one in four arrests (1.5% of all stops) resulted in a jail or prison sentence; one in fifty arrests (about 0.1% of all stops) led to a conviction for a crime of violence; one in fifty arrests (about 0.1% of all stops) led to a conviction for possession of a weapon; almost one in four (24.7%) arrests were dismissed before arraignment or resulted in a non-criminal charge; and racial disparities in stops were found through arrest, disposition, and sentencing).

⁴⁹ *Floyd*, 959 F.Supp.2d at 573; cf. JOSÉ LUIS MORÍN, LATINO/A RIGHTS AND JUSTICE IN THE UNITED STATES: PERSPECTIVES AND APPROACHES 129 (2d ed. 2005) (“[L]aw enforcement officers too often view the hip-hop fashions, tattoos, and other forms of expression currently in vogue among Latino/a youth—whether or not they actually belong to a gang—as synonymous with crime.”). The city argued, in part, that many stops effectuated by the NYPD interrupt a crime from occurring. *Floyd*, 959 F.Supp.2d at 575. The city, however, failed to offer evidence at trial of “a single stop that was based on reasonable suspicion, and . . . prevented the commission of a crime, but . . . did not result in probable cause for an arrest.” *Id.* The court found it “highly implausible” that successful preventive stops took place frequently enough such that in 88% of the NYPD’s 4.4 million stops, the suspicion giving rise to the stop was properly placed. *Id.*

⁵⁰ Simmons, *supra* note 9, at 366.

⁵¹ CATO INSTITUTE, 2010 NATIONAL POLICE MISCONDUCT STATISTICS AND REPORTING PROJECT POLICE MISCONDUCT STATISTICAL REPORT (2010), available at <http://www.policemisconduct.net/statistics/2010-annual-report>. This figure excludes sealed settlements, court costs, and attorney fees. *Id.* Of the 6,613 law enforcement officers involved in reported allegations of misconduct that met the Project’s criteria for tracking purposes, 1,575 (23.8%) were involved in excessive force reports—the most prominent type of report. *Id.*

⁵² David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 156 (2009).

⁵³ *Id.*

⁵⁴ *Id.* at 157.

increases police-community tensions.”⁵⁵ When friction between the police and the community exists, it becomes difficult for the two to forge partnerships aimed at dealing with crime, thereby undermining the community-policing model that has become popular in the United States.⁵⁶

C. *Inadequate Solutions to a National Problem*

Despite that police misconduct is a national issue,⁵⁷ the federal government has historically exhibited reluctance in investigating and prosecuting local law enforcement officers for misconduct at the first instance, preferring to serve as a “backstop.”⁵⁸ Although state governments have retained primary responsibility for regulating their officers, states have failed to prosecute officers for misconduct.⁵⁹ Generally, the federal government uses tools to combat police misconduct only when the states fail to act.⁶⁰

Commentators have observed that, although Congress has recognized the need for federal authority to address police misconduct, federal legislative measures thus far have fallen short of precipitating widespread institutional reform within police departments.⁶¹ First, 42 U.S.C. § 1983 permits victims of police misconduct to bring civil lawsuits in federal court for violations of their constitutional rights.⁶² Critics of § 1983 argue that it is an ineffective tool to remedy police

⁵⁵ Simmons, *supra* note 9, at 367; see HARRIS, *supra* note 8, at 52 (observing that civil rights activists in the 1960s and beyond “regarded stops and frisks as a major source of tension between police and minorities in inner cities”); ALEXANDER, *supra* note 4, at 122 (explaining how, in ghetto communities, “many black youth automatically ‘assume the position’ when a patrol car pulls up, knowing full well that they will be detained and frisked no matter what”); KERNER COMMISSION REPORT, *supra* note 1, at 164 (describing the use of stop-and-frisk as having “the potential for becoming a major source of friction between police and minority groups”).

⁵⁶ Simmons, *supra* note 9, at 368; see also Walker & Macdonald, *supra* note 9, at 483 (stating that “[c]itizen cooperation, in turn, is diminished by patterns of abusive police conduct that undermines public trust”); cf. Morín, *supra* note 49, at 125 (“Discrimination, segregation, ‘frustrated hopes,’ the ‘legitimization of violence,’ and ‘powerlessness’—terms used by the Kerner Commission to identify the basic causes for the disturbances of the 1960s in places such as Los Angeles and New York—are words that, in many ways, are still applicable to the circumstances under which many Latinos/as, African Americans, and other people of color live within U.S. society.”) (citation omitted).

⁵⁷ See generally Simmons, *supra* note 9, at 353 (noting that police brutality has long been an issue within American law enforcement agencies).

⁵⁸ *Id.* at 368 n.79.

⁵⁹ *Id.* at 368-69.

⁶⁰ *Id.* at 369.

⁶¹ *Id.* For a broader review of the major strategies for police reform, the positive achievements of these strategies, and their limitations to effectuating organizational change, see Walker & Macdonald, *supra* note 9, at 489-500 (discussing self-regulation, constitutional litigation, tort litigation, criminal prosecution of police officers, Blue Ribbon Commissions, and citizen oversight of the police).

⁶² 42 U.S.C.A. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . (2013).

For examples of § 1983 lawsuits alleging violations of Fourth and/or Fourteenth Amendment violations on the part of a police department, see, e.g., Daniels v. City of New York, 198 F.R.D. 409 (S.D.N.Y. 2001); Floyd, 959 F.Supp.2d 668

misconduct because municipalities generally indemnify police officers, and more broadly, this option rarely addresses “flawed management, policies, or patterns of abuse.”⁶³ Second, police officers may face criminal charges for engaging in police misconduct.⁶⁴ However, federal prosecutions—like state criminal prosecutions—are uncommon.⁶⁵ Lastly, under 42 U.S.C. § 14141, the U.S. Department of Justice (“DOJ”) can seek injunctive and declaratory relief against local law enforcement agencies where a “pattern or practice” of constitutional violations exists.⁶⁶ The use of § 14141 has been recognized as an important tool to precipitate institutional reform within police departments,⁶⁷ in large part because it focuses on the root of police misconduct rather than the bad deeds of individual officers. There are, however, a number of compelling critiques to this particular reform model.⁶⁸ For example, one critique is that § 14141 lacks an “overall philosophy that should guide the delivery of police services.”⁶⁹ For this reason, many of the consent decrees and memoranda of agreement the DOJ has entered into with the targeted police departments lack a mechanism to include community members as part of the reform.⁷⁰ In addition, Congress failed to

(S.D.N.Y. 2013); *Davis v. City of New York*, 902 F.Supp.2d 405 (S.D.N.Y. 2012); and *Ligon*, 925 F.Supp.2d 478 (S.D.N.Y. 2013).

⁶³ Simmons, *supra* note 9, at 369-70 (citation omitted); see also Walker & Macdonald, *supra* note 9, at 493 (“[C]onstitutional litigation over police practices necessarily involves discrete aspects of policing (for example, search and seizure or interrogations), which ignores the impact of the larger organizational culture on police behavior. A department may have a state of the art policy on reporting use of force incidents, for example, but the informal culture might tolerate or even encourage officers not to comply fully with the policy.”).

⁶⁴ 18 U.S.C. § 242 (2012) makes it a crime for a person acting “under color of any law, statute, ordinance, regulation, or custom, [to] willfully subject[] any person in any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States” Additionally, 18 U.S.C. § 241 (2012) makes it unlawful for “two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.” But see Walker & Macdonald, *supra* note 9, at 496 (“[M]uch police conduct, including the use of force without injury, racial, ethnic or sexual slurs, does not rise to the level of criminal conduct.”).

⁶⁵ Simmons, *supra* note 9, at 370.

⁶⁶ 42 U.S.C.A. § 14141 (2012) permits the Attorney General to file a lawsuit to eliminate “a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” DOJ has entered into consent decrees to reform police misconduct in dozens of law enforcement agencies nationwide, including the Los Angeles Police Department, the East Haven Police Department, the New Orleans Police Department, the Detroit Police Department, and the Seattle Police Department. See *Special Litigation Section Cases and Matters*, U.S. DEPARTMENT OF JUSTICE, <http://www.justice.gov/crt/about/spl/findsettle.php#police> (last visited June 8, 2014). The settlements typically involve a set of the following mandated reforms: improved use of force policies, early intervention systems, improved citizen complaint systems, and improved officer training. Walker & Macdonald, *supra* note 9, at 487. For an in-depth review of the implementation of § 14141 and the impact of “pattern or practice” litigation on local police departments, see Walker & Macdonald, *supra* note 9, at 502-536.

⁶⁷ See, e.g., HARRIS, *supra* note 8, at 201-02.

⁶⁸ Simmons, *supra* note 9, at 373.

⁶⁹ *Id.*

⁷⁰ *Id.* One notable exception to this criticism is the Cincinnati Collaborative Agreement—entered into by the Cincinnati Black United Front, the American Civil Liberties Union of Ohio Foundation, Inc., the City of Cincinnati, and the Fraternal Order of Police—which, among other things, included “outreach to the entire Cincinnati community through eight stakeholder groups: African-Americans, social service and religious organizations, businesses and philanthropic groups,

include a private right of action under § 14141 that would authorize citizens to initiate lawsuits. Because § 14141 creates an “exclusively executive-run . . . regime,” critics have argued that enforcement may be compromised by partisanship.⁷¹ Another concern is that the federal government has failed to aggressively exercise its enforcement authority.⁷² Yet another critique is that the reforms are not sustainable, given that there is no process to ensure that the implemented reforms will continue after the negotiated agreement is terminated.⁷³ And finally, commentators note that the current model under § 14141 fails to encourage experimentation and information-sharing among jurisdictions.⁷⁴

Despite the shortcomings of these legislative measures, they remain important tools in addressing police misconduct.⁷⁵ Notwithstanding the availability of these tools, the next section explores the untapped potential of using the FHA to remedy widespread stop-and-frisk violations.

II. THE FAIR HOUSING ACT: A VALUABLE SUPPLEMENTAL TOOL

The Fair Housing Act, enacted as Title VIII of the Civil Rights Act of 1968, makes it unlawful to, *inter alia*, “discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”⁷⁶ As a general matter, FHA claims may be brought under theories of both disparate treatment and disparate impact.⁷⁷ Because this Article focuses on those instances where intentional discrimination cannot be proven, only the latter theory is relevant here. Despite the uniform acceptance of disparate impact theory under the FHA among the federal appellate courts presented with the issue (eleven in all),⁷⁸ several different

police line officers and spouses, City officials, white citizens, other minorities and youth.” See Collaborative Agreement, In re Cincinnati Policing, No. C-1-99-317, 2001 WL 1842470, at ¶ 4 (S.D. Ohio, Apr. 12, 2001), available at <http://www.cincinnati-oh.gov/police/permits-auctions-references/collaborative-agreement/>.

⁷¹ Simmons, *supra* note 9, at 373.

⁷² *Id.* at 375.

⁷³ *Id.* at 376.

⁷⁴ *Id.*

⁷⁵ See Walker & Macdonald, *supra* note 9, at 501 (“Experts generally agree that no single reform strategy has been completely effective, or is likely to be effective, in establishing consistently high standards of professional conduct.”).

⁷⁶ 42 U.S.C.A. § 3604(b) (2013).

⁷⁷ See, e.g., *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 711 (9th Cir. 2009); *Hack v. President of Yale Coll.*, 237 F.3d 81, 88 (2d Cir. 2000).

⁷⁸ Implementation of the Fair Housing Act’s Discriminatory Effects Standard, Final Rule [hereinafter “FHA Implementation Rule”], 78 Fed. Reg. 11,460, 11,462 (Feb. 15, 2013) (to be codified at 24 C.F.R. pt. 100). See, e.g., *Graoch Assocs. v. Louisville/Jefferson Cnty. Metro. Human Relations Comm’n*, 508 F.3d 366, 374 (6th Cir. 2007); *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Hallmark Developers, Inc. v. Fulton Cnty.*, 466 F.3d 1276, 1286 (11th Cir. 2006); *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 740-41 (8th Cir. 2005); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49-50 (1st Cir. 2000); *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988); *Huntington Branch Nat’l Assoc. for the Advancement of Colored People v. Town of Huntington*, 844 F.2d 926, 937-38 (2d Cir. 1998), *aff’d*, 488 U.S. 15 (1988) (per curiam); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 987-89 & n.3 (4th Cir. 1984); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d

frameworks have been applied to claims proceeding under that theory over the past four decades.⁷⁹ The U.S. Department of Housing and Urban Development (“HUD”), which is charged with interpreting and enforcing the FHA, has always used a three-step burden-shifting approach.⁸⁰ Under this approach, the plaintiff must make a *prima facie* showing “that the challenged practice caused or predictably will cause a discriminatory effect.”⁸¹ A practice is defined to have a discriminatory effect when it “actually or predictably results in disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.”⁸² If the plaintiff makes this *prima facie* showing, then the burden of proof shifts to the defendant to prove that “the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.”⁸³ If the defendant satisfies its burden, then the plaintiff must demonstrate that “the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”⁸⁴

A. *The Current Status of the Disparate Impact Theory under the FHA*

The Supreme Court questioned this “quiet, if muddled, landscape”⁸⁵ in 2011 by granting certiorari in *Magner v. Gallagher*⁸⁶ to address two questions: (1) whether disparate impact claims are cognizable under the FHA; and (2) if such claims are cognizable, which test should be used to analyze them.⁸⁷ Following “pressure from civil rights and housing advocates nationwide” and

1283, 1290-91 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-86 (8th Cir. 1974).

⁷⁹ The U.S. Department of Housing and Urban Development (“HUD”), along with many federal courts of appeal, has used a three-step burden-shifting approach. FHA Implementation Rule, 78 Fed. Reg. at 11,462; *see, e.g., Charleston*, 419 F.3d at 740-42; *Langlois*, 207 F.3d at 49-50; *Huntington Branch*, 844 F.2d at 939. One federal appellate court applies a multi-factor balancing test. *See Metro. Hous. Dev. Corp.*, 558 F.2d at 1290. Other appellate courts apply a hybrid between the two. *See Graoch*, 508 F.3d at 373; *Mountain Side Mobile Estates v. Sec’y of Hous. & Urban Dev.*, 56 F.3d 1243, 1252, 1254 (10th Cir. 1995). And one court applies different tests for public and private defendants. *See Betsey*, 736 F.2d at 989 n.5.

⁸⁰ FHA Implementation Rule, 78 Fed. Reg. at 11,462.

⁸¹ 24 C.F.R. § 100.500(c)(1) (2013).

⁸² *Id.* § 100.500(a).

⁸³ *Id.* § 100.500(c).

⁸⁴ *Id.* All but one of the federal appellate courts that rely on the burden-shifting approach place the burden on the plaintiff to prove that a less discriminatory alternative exists. *Compare* *Mount Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011), *cert. dismissed*, 134 S.Ct. 636 (2013), *Gallagher v. Magner*, 619 F.3d 823, 834 (8th Cir. 2010), *Graoch*, 508 F.3d at 373-74, and *Mountain Side Mobile Estates*, 56 F.3d at 1254 (all placing the burden of demonstrating less discriminatory alternative on plaintiff), *with Huntington Branch*, 844 F.2d at 939 (placing the burden on the defendant to demonstrate that no less discriminatory alternative exists).

⁸⁵ Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 374 (2013).

⁸⁶ 132 S. Ct. 548 (2011).

⁸⁷ Brief of Petitioner-Appellant at 38, *Magner v. Gallagher*, 132 S. Ct. 548 (2011) (No. 10-1032), 2011 U.S. S. Ct. Briefs LEXIS 2812. For a thorough analysis of the issues presented by *Magner*, *see* Seicshnaydre, *supra* note 85, at 357-64.

fearing that “a Supreme Court showdown with the landlords could provide a Pyrrhic victory . . . that weakens the notion of ‘disparate impact’ in civil rights enforcement,” the city withdrew their petition shortly before oral argument.⁸⁸ Among those who also expressed concern was former U.S. Senator and FHA sponsor, Walter Mondale, who stated that if the Supreme Court were to find the disparate impact test under the FHA unconstitutional, “[t]hat would largely de-fang the Fair Housing Act.”⁸⁹

Little more than a year after the dismissal of the writ of certiorari in *Magner*, the Supreme Court again granted certiorari to address the validity of disparate impact claims under the FHA, this time in *Township of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*⁹⁰ The Court limited review to only one of the questions presented by the petition: “Are disparate impact claims cognizable under the Fair Housing Act?”⁹¹ As with *Magner*, however, the parties settled prior to oral argument,⁹² thereby leaving the disparate impact theory under the FHA intact.

B. *Police Services: A Municipal Service under the FHA*

As stated previously, the Fair Housing Act, in § 3604(b), prohibits discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling because of race.⁹³ Although some may perceive the scope of the FHA to be limited to prohibiting discrimination in the actual sale or rental of a dwelling (for example, refusing to rent an apartment to a black applicant), such a perception narrowly construes the language and purpose of the FHA.⁹⁴ Recognizing this, some courts have held that the FHA covers post-acquisition conduct—discrimination that occurs after an individual acquires housing.⁹⁵ For this reason, discrimination in

⁸⁸ Kevin Diaz, *St. Paul Yanks Housing Fight from High Court*, STAR TRIBUNE, Feb. 11, 2012, available at <http://www.startribune.com/politics/national/139138084.html>; see *Magner v. Gallagher*, 132 S. Ct. 1306 (2012).

⁸⁹ Diaz, *supra* note 88.

⁹⁰ *Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013). For a thorough analysis of the issues presented by *Mt. Holly*, see Seicshnaydre, *supra* note 85, at 364-67.

⁹¹ *Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (2013); Petition for Writ of Certiorari, *Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*, 2012 U.S. S. Ct. Briefs LEXIS 2623 (June 11, 2012) (No. 11-1507).

⁹² Adam Liptak, *Fair-Housing Case Is Settled Before It Reaches Supreme Court*, N.Y. TIMES, Nov. 15, 2013, at A18. Despite concern that some members of the Supreme Court considered *Mount Holly* an opportunity for framing disparate impact theory in an undesirable way, some commentators have expressed optimism that disparate impact claims under the FHA will survive any equal protection arguments. See Seicshnaydre, *supra* note 85, at 398-406 & n.280; see also Eric W.M. Bain, Note, *Another Missed Opportunity to Fix Discrimination in Discrimination Law*, 38 WM. MITCHELL L. REV. 1434, 1459-68 (2012) (explaining the reasons the Supreme Court should recognize the validity of disparate impact under the FHA); see also Seicshnaydre, *supra* note 85, at 414 (“Of course, if the Court eliminates FHA disparate impact claims, plaintiffs may be able to assert them under state and local laws.”).

⁹³ *Southend Neighborhood Improvement Ass’n v. Cnty. of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984) (“[Section 3604(b) applies to services generally provided by governmental units such as police . . . protection . . .”).

⁹⁴ See Benjamin A. Schepis, *Making the Fair Housing Act More Fair: Permitting Section 3604(b) to Provide Relief for Post-Occupancy Discrimination in the Provision of Municipal Services—A Historical View*, 41 U. TOL. L. REV. 411, 416-24 (2010).

⁹⁵ The federal courts of appeal are currently split as to whether the FHA covers post-acquisition conduct. According to commentators, the majority of courts favor permitting § 3604(b) claims alleging the discriminatory provision

the provision of law enforcement services, even after an individual has purchased or rented her dwelling, falls within the FHA's coverage.

i. The Provision of Inadequate Police Services

Courts have recognized the viability of a § 3604(b) claim for a municipality's failure to provide minority neighborhoods with adequate police services.⁹⁶ In *Committee Concerning Community Improvement v. City of Modesto*, for example, residents of predominantly Latino neighborhoods alleged, *inter alia*, that the County failed to provide them with adequate municipal services.⁹⁷ Specifically, the plaintiffs alleged that the dispatch time (the time lapse between a call to 911 and the dispatch of an officer) and the total response time (the time lapse between a 911 call and the arrival of an officer on scene, including dispatch time) of law-enforcement and emergency response personnel were slower in predominantly Latino neighborhoods than in predominantly white neighborhoods.⁹⁸ The difference in dispatch time between the majority Latino neighborhoods and majority white neighborhoods was, at a minimum, almost two minutes; the difference in response was, at a minimum, almost one minute.⁹⁹ The County offered no reason why dispatch times were different between neighborhoods.¹⁰⁰ Instead, the County argued that response time was

of municipal services to residents, but a significant number do not. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 14:3 (2013); see generally Schepis, *supra* note 94 (recognizing the two general approaches of federal courts in their interpretation of § 3604(b)). Compare *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713-15 (9th Cir. 2009), *Davis v. City of New York*, 902 F. Supp. 2d 405, 435-37 (S.D.N.Y. 2012), *Hidden Vill., LLC v. City of Lakewood*, 867 F. Supp. 2d 920, 934-38 (N.D. Ohio 2012), *Richards v. Bono*, No. 5:04-cv-484-Oc-10GRJ, 2005 U.S. Dist. LEXIS 43585, at *7-20 (M.D. Fla. Apr. 26, 2005), *United States v. Koch*, 352 F. Supp. 2d 970, 972-979 (D. Neb. 2004), *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 U.S. Dist. LEXIS 18220, at *24-27 (N.D. Tex. Sept. 9, 2004), and *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143-44 (N.D. Ill. 1993) (all permitting § 3604(b) claims alleging the discriminatory provision of municipal services to residents) with *Cox v. City of Dallas*, 430 F.3d 734, 745-746 (5th Cir. 2005), and *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 328-30 (7th Cir. 2004) (barring § 3604(b) claims alleging the discriminatory provision of municipal services to residents). But see *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (revisiting *Halprin*, 388 F.3d 327, and discussing post-acquisition claims). Some courts have found the distinction between "sale" and "rental" to be crucial in determining whether post-acquisition discrimination is protected by § 3604(b). See, e.g., *Richards*, 2005 U.S. Dist. LEXIS 43585, at *11; *Jackson v. Comberg*, No. 8:05-cv-1713-T-24TMAP, 2006 U.S. Dist. LEXIS 66405, at *11 (M.D. Fla. Aug. 22, 2006) (following the reasoning in *Richards*). See also Mary Pennisi, Note, *A Herculean Leap for the Hard Case of Post-Acquisition Claims: Interpreting Fair Housing Act Section 3604(b) After Modesto*, 37 FORDHAM URB. L.J. 1083, 1139-46 (2010) (suggesting that the Supreme Court should eliminate the distinction between pre- and post-acquisition discrimination and permit plaintiffs to raise claims under § 3604(b) for discrimination that occurs at any time in the acquisition process).

⁹⁶ See *Comm. Concerning Cmty. Improvement*, 583 F.3d at 707-709 (residents of predominantly Latino neighborhoods alleged, *inter alia*, that the dispatch time and the total response time of law enforcement personnel were slower in predominantly Latino islands than in predominantly white islands); *Campbell*, 815 F. Supp. at 44 (African-American plaintiffs alleged that the superintendent of police terminated police protection of their home from racially motivated attacks based on their race).

⁹⁷ 583 F.3d at 696.

⁹⁸ *Id.* at 699.

⁹⁹ *Id.* at 708.

¹⁰⁰ *Id.*

the most important measure to the person waiting for the police to arrive.¹⁰¹ The Ninth Circuit found that this argument had weight, but disagreed that “as a matter of law, a difference of one minute can be characterized as not making a ‘meaningful difference’ when one is waiting at one’s home for law-enforcement or emergency personnel to arrive.”¹⁰² The Ninth Circuit, therefore, reversed the grant of summary judgment to the County on the plaintiffs’ FHA claims regarding the discriminatory provision of law enforcement services.¹⁰³ The parties subsequently settled the case.¹⁰⁴

ii. The Provision of Overly Aggressive Police Services

Albeit arguably counterintuitive, the zealous provision of municipal services to minority neighborhoods may also violate the FHA. For this reason, courts have recognized the viability of a § 3604(b) claim for a city’s provision of more aggressive police services to minority neighborhoods.¹⁰⁵

In *Doe v. County of Kankakee*, residents of a predominantly African American complex alleged, *inter alia*, discrimination in rental housing under § 3604(b) by the city of Kankakee, the county of Kankakee, and the Kankakee Area Metropolitan Enforcement Group (“KAMEG”) for their aggressive policing tactics.¹⁰⁷ The stated goal of KAMEG was to combat the illegal drug trade and other crimes occurring in local jurisdictions “through policy and procedure, us[ing] aggressive methods of law enforcement, including the prohibition of loitering for lawful purposes, conducting arrests without probable cause or warrant, random searches, and excessive force in making arrests.”¹⁰⁸ KAMEG employed these practices in low-income housing throughout the area, including the plaintiffs’ complex.¹⁰⁹ The city entered into an agreement with the owner of the

¹⁰¹ *Id.*

¹⁰² *Id.* at 709.

¹⁰³ *Id.* Although the Ninth Circuit examined the racially disparate statistics in its equal protection analysis, the Court reinstated the plaintiffs’ FHA claims regarding the provision of law enforcement services, observing that the plaintiffs’ “factual averments supporting the alleged violations of the FHA are largely the same as the allegations supporting plaintiffs’ claims that their rights to equal protection were violated by defendants’ actions with regard to municipal services,” including “an ongoing discriminatory failure to provide adequate law enforcement protection and emergency services” *Id.* at 714–15 & n.15.

¹⁰⁴ See *Comm. Concerning Cmty. Improvement v. City of Modesto*, No. Civ. F-04-6121 LJO DLB (E.D. Cal. June 30, 2011), Dkt. No. 559.

¹⁰⁵ See *Doe v. County of Kankakee*, No. 03 C 8786, 2004 U.S. Dist. LEXIS 12740 at *14–17 (N.D. Ill. July 6, 2004) (discussing plaintiffs’ allegation, *inter alia*, that the city, the county, and the joint venture of municipalities selectively applied aggressive law enforcement tactics to the detriment of the complex’s predominantly African American residents); cf. *Inland Mediation Bd. v. City of Pomona*, 158 F. Supp. 2d 1120 (C.D. Cal. 2001) (discussing plaintiffs’ allegation, *inter alia*, that the city sponsored a landlord screening service limited only to landlords in an area comprised of mostly minority residents and that the city provided different services to this area in violation of § 3604(a)).

¹⁰⁶ *Doe*, 2004 U.S. Dist. LEXIS 12740, at *4 (describing KAMEG as “a joint venture of municipalities . . . [which] is composed of members of law enforcement from both the City and County.”).

¹⁰⁷ *Id.* at *2–*3.

¹⁰⁸ *Id.* at *5.

¹⁰⁹ *Id.*

complex and the management firm for the complex giving authority to the city to control any non-residents found in the common areas of the complex.¹¹⁰

The *Doe* plaintiffs alleged that the county, by stringently enforcing the agreement through KAMEG, violated § 3604(b) by discouraging the use of the complex's common areas.¹¹¹ The plaintiffs further alleged that the city, the county, and KAMEG applied these law enforcement tactics selectively and based on race, color, and national origin.¹¹² Finding that the plaintiffs sufficiently alleged a cause of action under § 3604(b), the court denied the county's motion to dismiss on this claim.¹¹³ The parties subsequently settled the case.¹¹⁴

Application of § 3604(b) to the Overly Aggressive Use of Stop-and-Frisk in Minority Neighborhoods

Though the issue has not been fully litigated,¹¹⁵ relying on § 3604(b) of the FHA to combat the aggressive use of stop-and-frisk practices in minority neighborhoods deserves some attention, particularly when the DOJ has failed to act pursuant to its "pattern or practice" authority. To do so, a minority resident-plaintiff, with the assistance of an expert,¹¹⁶ would have to demonstrate that the practices of her local police department disproportionately affect minority residents, and that police officers engage in more stop-and-frisk activity in her minority neighborhood than in non-minority neighborhoods.¹¹⁷ Such an effort would require documentation measuring the level of police enforcement—namely the practice of stop-and-frisk. If the resident meets her burden, which she is likely to do given that aggressive law enforcement tactics tend to be concentrated "in the 'hood,"¹¹⁸ then the local police department would have the burden to prove that its stop-and-frisk practices are

¹¹⁰ *Id.* at *6.

¹¹¹ *Id.* at *15.

¹¹² *Id.*

¹¹³ *Id.* at *15-*16.

¹¹⁴ *See Doe v. County of Kankakee*, No. 1:03-cv-08786, (N.D. Ill. Jan. 12, 2005), Dkt No. 49.

¹¹⁵ *See, e.g.*, Complaint at ¶¶ 202-13, 244-250, *Davis v. City of New York*, 902 F.Supp.2d 405 (S.D.N.Y. Jan. 28, 2010) (No. 10 Civ. 0699 (SAS)) (pleading a disparate impact claim under the FHA for the NYPD's discriminatory stop-and-frisk practices in New York City Housing Authority buildings), *withdrawn*, 2013 U.S. Dist. LEXIS 45601 (plaintiffs consented to the dismissal of their FHA disparate impact claim); Complaint at ¶¶ 186-96, 205, *Ligon v. City of New York*, 925 F.Supp.2d 478 (S.D.N.Y. Mar. 28, 2012) (pleading a disparate impact claim under the FHA for the NYPD's discriminatory stop-and-frisk practices in private residential buildings enrolled in the Trespass Affidavit Program).

¹¹⁶ *See Seicshnaydre, supra* note 85, at 383 (noting the importance of having an expert to develop the statistical analysis necessary to establish a prima facie case of disparate impact); *see, e.g.*, Jeffrey Fagan et al., *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUDIES 697 (2012) (comparing trespass and other enforcement activities in New York City Housing Authority developments with the same parameters of enforcement in similarly situated areas to determine if public housing in New York is targeted for trespass enforcement). *But cf.* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 257 (2011) ("It is today very rare for plaintiffs other than highly sophisticated and well-funded litigants, such as the U.S. Department of Justice, to prevail under Title VII on a disparate impact theory.").

¹¹⁷ In New York City, for example, police officers are required to complete a UF-250 form, also known as a "Stop, Question and Frisk Report Worksheet," after each *Terry* stop. *Floyd*, 959 F.Supp.2d at 572. Each side of the form contains checkboxes and fields in which officers are required to indicate the nature of the stop, the location of the stop, and the circumstances leading to and justifying the stop. *Id.* & app. A.

¹¹⁸ ALEXANDER, *supra* note 4, at 121 ("[W]hen police go looking for drugs, they look in the 'hood. Tactics that would be political suicide in an upscale white suburb are not even newsworthy in poor black and brown communities.").

necessary to “achieve one or more substantial, legitimate, nondiscriminatory interests”¹¹⁹—most likely combating high crime.¹²⁰ Put another way, the local police department must demonstrate that its level of enforcement activities in minority neighborhoods can be explained by crime conditions in those neighborhoods. The department engaging in racially discriminatory behavior likely would not be able to meet this burden; instead, expert analysis would reveal that, even after controlling for crime, law enforcement activities in minority neighborhoods remain racially skewed.¹²¹ If the police department meets its burden of demonstrating that high crime in minority neighborhoods justifies its practices, however, then the resident must prove that these interests can be served by another practice that has a less discriminatory effect.¹²²

Challenging stop-and-frisk practices by relying on an FHA disparate impact theory has practical significance.¹²³ First, unlike the DOJ’s “pattern or practice” authority under § 14141, the FHA provides a private right of action, meaning that individual plaintiffs can sue without waiting for the federal government to act. Challenges to the stop-and-frisk practices of police departments, therefore, would not be compromised by partisan politics, nor would they depend on the resources of a federal agency.¹²⁴ Second, unlike an Equal Protection claim under § 1983, an FHA claim for the provision of overly aggressive municipal services can be premised on an impact theory, rather than being constrained to proving intent.¹²⁵ Third, the threat of FHA liability may encourage municipalities and their police departments to adopt best practices.¹²⁶ Finally, an FHA claim

¹¹⁹ 24 C.F.R. § 100.500(c)(2) (2014).

¹²⁰ See, e.g., Fagan, *supra* note 116, at 703 (noting that, in response to a legal challenge, the police could argue that the higher crime rates in public housing motivated the higher rate of sweeps).

¹²¹ See *id.* at 698, 718-22 (demonstrating that the level of trespass enforcement in public housing cannot be explained by crime); Floyd, 959 F.Supp.2d at 560-62; NY ATTORNEY GENERAL 1999 STOP & FRISK REPORT, *supra* note 7, at 119 (noting that, even when crime was accounted for statistically, racial minorities were stopped at a higher rate than whites).

¹²² 24 C.F.R. § 100.500(c)(3) (2014). See, e.g., Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing “High-Crime Areas,”* 63 HASTINGS L.J. 179, 221-25 (2011) (proposing a more “particularized approach” to deploying officers in “high-crime areas” through the use of mapping technology so as to “respect[] the liberty of individuals living in high-crime neighborhoods and minimize[] the reputational damage done by an overbroad generalization”); Fagan, *supra* note 116, at 720-21 (finding that the study’s results suggest that “race and ethnicity play an important role in the conduct of enforcement in public housing, a role that is present after controlling for other policy-relevant factors [such as crime] and social conditions, as well as for the allocation of police resources and the intensity of policing tactics”).

¹²³ See Robert G. Schwemm, *The Fair Housing Act After 40 Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation*, 41 IND. L. REV. 717, 789-90 (2008) (observing that the value of FHA coverage would be in those cases where its procedures or relief are more favorable—e.g., broader standing to sue; agency authority to enforce; different statutes of limitations; a well-established “continuing violation theory”; and potential authorization of punitive damage awards). But see Seicshnaydre, *supra* note 85 (finding that an analysis of forty years of appellate case law demonstrates that courts have a narrow view of FHA disparate impact theory).

¹²⁴ See Simmons, *supra* note 9, at 373, 375.

¹²⁵ See Schwemm, *supra* note 123, at 789-90; see also Seicshnaydre, *supra* note 85, at 414 (“[T]he disparate treatment standard by itself is an insufficient method of proof to capture the policies and procedures used to maintain racial segregation in the United States”).

¹²⁶ See Brief of the Leadership Conference on Civil and Human Rights as Amicus Curiae in Support of Respondents at 21-24, *Twp. of Mt. Holly v. Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824 (Oct. 28, 2013); cf. Walker & Macdonald, *supra* note 9, at 495 (noting that some scholars have argued that the fear of tort litigation, as opposed

reinforces the notion that place matters. Blacks “remain the most racially segregated population in the nation,”¹²⁷ followed by Latinos.¹²⁸ These populations are “segregated not just from whites but also from opportunities that are critical to the quality of life, stability, and advancement. Where one lives determines one’s connection to jobs, high-performing neighborhood schools, green space, quality retail stores, fresh foods, and safety.”¹²⁹ Living in a racially segregated building or neighborhood forces residents of color to pay a price—overzealous policing—that those living elsewhere do not.¹³⁰ When the level of policing is not proportional to the relevant crime conditions, or when criminality occurs in significant numbers in non-minority areas and yet does not receive law enforcement attention, the FHA is available to ensure that the price minority residents pay is not higher than it should be.

III. CONCLUSION

As the Supreme Court recognized in *Terry* forty-five years ago, “it is simply fantastic to urge that [a frisk] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’”¹³¹ This has not changed. If anything, it is more true today, as local police departments, by increasingly relying on stop-and-frisk tactics in minority communities, have demonstrated that place matters. Where residents live determines the nature of their relationship with the police. For minority residents, that relationship is often corrosive, built on the false premise that the police are present to protect them when the reality is the opposite: they are there to oppress and harass them in a racialized manner. The federal legislative measures typically relied on to remedy this kind of police misconduct have fallen short of effectuating institutional reform. Challenging a police department’s discriminatory provision of police services to minority neighborhoods by bringing disparate impact claims under the Fair Housing Act represents a viable supplement.

to actual lawsuits, has been a major stimulus to police reform since the mid-1970s).

¹²⁷ LEADERSHIP LEARNING COMMUNITY, LEADERSHIP & RACE: HOW TO DEVELOP AND SUPPORT LEADERSHIP THAT CONTRIBUTES TO RACIAL JUSTICE [hereinafter “LEADERSHIP & RACE REPORT”] 6 (2010), available at http://leadershiplearning.org/system/files/Leadership%20and%20Race%20FINAL_Electronic_072010.pdf.

¹²⁸ JOHN R. LOGAN, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS AND ASIANS IN METROPOLITAN AMERICA 1, 4, 15-16 (2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf>; see also JOHN R. LOGAN & WENQUAN ZHANG, GLOBAL NEIGHBORHOODS: NEW EVIDENCE FROM CENSUS 2010, at 1 (2011) (“About half the black population and forty percent of Hispanics still live in neighborhoods without a white presence.”), <http://www.s4.brown.edu/us2010/Data/Report/globalfinal2.pdf>; see also POVERTY & RACE RESEARCH ACTION COUNSEL & NATIONAL FAIR HOUSING ALLIANCE, RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES: VIOLATIONS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, at i (2008), available at <http://www.prrac.org/pdf/FinalCERDHousingDiscriminationReport.pdf> (“Residential segregation is an insidious and persistent fact of American life. Discrimination on the basis of race, while on the decline according to some statistics, continues to pervade nearly every aspect of the housing market in the United States.”).

¹²⁹ LEADERSHIP & RACE REPORT, *supra* note 127, at 6.

¹³⁰ See ALEXANDER, *supra* note 4, at 129 (observing that even seemingly race-neutral factors, such as location, for the concentration of law enforcement resources in ghetto communities operate in a discriminatory fashion).

¹³¹ 392 U.S. at 14.